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15 Delaware corporation

16
17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 OAKLAND DIVISION

20
21 APPLE INC., a California corporation,

22 Plaintiff and
Counter-Defendant,

23 vs.

24 AMAZON.COM, INC., a Delaware
corporation, and AMAZON DIGITAL
SERVICES, INC., a Delaware corporation,

25 Defendants and
Counter-Claimants.

26 Case No. 11-cv-01327 PJH

27 Action Filed: March 18, 2011

28 **JOINT DISCOVERY LETTER BRIEF
CONCERNING EXPERT DISCOVERY
MATTER**

Courtroom: F, Fifteenth Floor
Judge: Hon. Jacqueline Scott Corley

Trial Date: August 19, 2013

1 **JOINT LETTER BRIEF CONCERNING EXPERT DISCOVERY MATTER**

2 Pursuant to Federal Rules of Civil Procedure 26 and 37, and the Civil Standing Order for
 3 Magistrate Judge Jacqueline Scott Corley, Defendants and Counter-Claimants Amazon.com, Inc.
 4 and Amazon Digital Services, Inc. (collectively, "Amazon") and Plaintiff and Counter-Defendant
 5 Apple, Inc. ("Apple") hereby jointly submit the following discovery letter brief. Amazon asks that
 6 Apple be compelled to produce undisclosed survey work conducted by Brian Dragun and Tim
 7 Hoffman of Crossfield Associates, LLC, and to make Messrs. Dragun and Hoffman available for
 8 deposition. Apple opposes this motion.¹

9 **Amazon's Statement Of Relevant Facts**

10 Apple disclosed Dr. Carol Scott of Crossfield Associates, LLC ("Crossfield") as a testifying
 11 survey expert in this case. Dr. Scott's report disclosed that she conducted four surveys in mid-2012.
 12 It is undisputed that Dr. Scott received substantial assistance from two of her colleagues at
 13 Crossfield to design, deploy, and analyze the results of the surveys. Those two individuals are
 14 Brian Dragun and Tim Hoffman. Apple produced with the Scott report billing records that show the
 15 amount expended in connection with Dr. Scott's work and those included the time spent by
 16 Mr. Dragun and Mr. Hoffman from January to September 2012. At the deposition of Dr. Scott it
 17 became apparent that Mr. Dragun and Mr. Hoffman ran at least one additional survey for this
 18 litigation early in the course of their working with and assisting Dr. Scott. Amazon seeks discovery
 19 of the undisclosed survey work because of the high likelihood that it has influenced and informed
 20 the surveys upon which Dr. Scott's report and opinions are ostensibly based, and indeed may
 21 contradict or undermine the conclusions that Dr. Scott offers.

22 Amazon first learned of the undisclosed survey work when Apple produced the invoices and
 23 discoverable materials related to Dr. Scott's work.² The Crossfield invoices showed that two
 24 individuals, Brian Dragun and Tim Hoffman, have each devoted far more time to this case than
 25 Dr. Scott, especially in the months of January-March of 2012. In this time, Messrs. Dragun and
 26 Hoffman had daily entries for items such as "Survey development," "Reviewed results," "Worked
 27 on survey," "Worked on survey draft," "Worked on survey and analyses," and "Review of survey
 28 work." The February 2012 invoice shows "Research fees" of \$25,716—consistent with the cost of
 29 fielding a survey. The invoices show that all three individuals continued to work on this case up
 30 until the time Dr. Scott's report was disclosed. From January to September 2012, Messrs. Dragun
 31 and Hoffman each worked more than twice as many hours on this matter as Dr. Scott.

32 When asked at deposition about these entries and whether Crossfield's Mr. Dragun
 33 conducted a survey in *this* case that was not disclosed in her report, Dr. Scott claimed ignorance and
 34 testified: "Well, I don't know if he did or he didn't. I would only know what was done if I was
 35 involved in it." (Scott Depo. Tx. 65:4-6) When asked if it was *possible* her colleagues did a survey
 36 she didn't know about, Dr. Scott testified: "You know, it's entirely possible that they were doing
 37 pilots or they were doing something for Apple that wasn't related to me at all." (*Id.* 65:10-12)
 38 Dr. Scott simply could not say what the undisclosed work consisted of: "I am not able to tell you
 39 what they were doing." (*Id.* 66:3-4)

40 In addition to their initial survey work, apparently claimed to be some sort of separate
 41 engagement of which Dr. Scott was allegedly kept in the dark despite the production of the invoices
 42 for that work, Messrs. Dragun and Hoffman went on to design, implement, monitor, analyze, and
 43 write up the surveys upon which Dr. Scott's report is based. It is apparent from the invoices that the
 44 members of Crossfield collaborated "hand-in-glove" for many months to produce the Scott report.

45 ¹ This case was referred to Magistrate Judge Corley for resolution of all discovery matters.

46 ² The parties agreed at the outset of expert discovery to produce all invoices and materials
 47 discoverable under the stipulated protective order one week prior to each expert's deposition.

1 Dr. Scott testified that when she and her colleagues at Crossfield obtain and analyze survey data,
 2 Messrs. Dragun and Hoffman “will do all the initial putting together,” and “after they’ve done the
 3 initial work, then that’s when I get involved.” (*Id.* 69:7-15) Yet Dr. Scott could not recall whether
 4 she designed the surveys herself or if this was done in collaboration with Messrs. Dragun and
 5 Hoffman. (*Id.* 71:21-72:4) She did testify that Mr. Hoffman did a “cleaning” of the data before
 6 Dr. Scott saw it, and that she, Mr. Hoffman and Mr. Dragun may have jointly examined and
 7 discussed the data. (*Id.* 86:25-88:3).

8 Following the deposition, Amazon wrote to request that Apple produce the undisclosed
 9 Crossfield surveys. In reply, Apple acknowledged the existence of undisclosed work yet claimed
 10 that, aside from closely assisting Dr. Scott, Mr. Dragun *also* acted as a consulting survey expert for
 11 Apple, assisted by Mr. Hoffman. Apple said this work was protected by Rule 26(b)(4)(D) and was
 12 not discoverable under the stipulated protective order. Apple also claimed that “Dr. Scott is not
 13 familiar with Mr. Dragun’s work as a non-consulting expert because that work was not discussed
 14 with Dr. Scott, she does not rely upon it in any way, and it does not comprise facts or data
 15 considered by her in forming the opinions set forth in her reports.” In a responsive letter, Amazon
 16 cited the authorities discussed below. These show that a party is entitled to discovery of *all*
 17 information related to a testifying expert’s work, including the work of her assistants. Moreover,
 18 when a “non-testifying” consultant also performs “testifying” expert work, any ambiguity in the
 19 role played by the consultant must be resolved in favor of discovery. Therefore, Apple must
 20 produce all undisclosed survey materials and make Messrs. Dragun and Hoffman available for
 21 deposition. Further, Amazon is entitled to test the very notion that these Crossfield employees
 22 worked side-by-side on this same project with the left hand completely unaware of the work of the
 23 right hand. The parties met and conferred in person on February 28, 2013. As before, Apple
 24 maintained that *no part* of the undisclosed work was discoverable.

14 Amazon’s Position and Legal Authorities

15 *1. Amazon Is Entitled To Discovery Of All Work Done By Messrs. Dragun and Hoffman.*

16 The work of a testifying expert’s assistant is discoverable, both by document discovery and
 17 depositions. *See Derrickson v. Circuit City Stores, Inc.*, No. DKC 95-3296, 1999 WL 1456538, at
 18 *6-7 (D. Md. Mar. 19, 1999), *aff’d sub nom. Johnson v. Circuit City Stores, Inc.*, 203 F.3d 821 (4th
 19 Cir. 2000). In *Derrickson*, a testifying expert, Dr. Medoff, relied on tables regarding compensation
 20 and promotions that were “based on data that was subjected to various selection, aggregation and
 21 weighting processes performed by Dr. Medoff’s assistant.” *Id.* The court rejected the assertion—
 22 exactly that now put forth by Apple—that the assistant’s work was non-discoverable work-product:

23 The court need not waste its time analyzing the work of Dr. Medoff’s assistant as the
 24 work of a so-called “non-testifying” expert. Dr. Medoff and his assistant worked
 25 hand-in-glove, and the fruits of their labor are indivisible. Defendant cannot
 26 properly cross-examine Dr. Medoff without first understanding how his assistant
 27 manipulated the data Dr. Medoff’s opinions in this matter are the result of a
 28 seamless collaboration with his assistant. Under these circumstances, Defendant is
 entitled to know what Dr. Medoff’s assistant did. (*Id.*)

29 In the alternative, the court held that even *if* the assistant were a consultant, discovery was
 30 consistent with the purpose of Rule 26(b)(4)(B) because the information was sought to undermine
 31 and impeach the testifying expert’s report. *Id.* at *7. Moreover, the court found “exceptional
 32 circumstances” requiring production because “[o]nly Dr. Medoff’s assistant knows what he did to
 33 the data, and because that information is exclusively within the assistant’s cognizance, Defendant is
 34 entitled to it under Rule 26(b)(4)(B).” *Id.*

35 Other courts have held that a party in Apple’s position cannot withhold discovery of the
 36 work of “assistants” to a testifying expert under the fiction that these individuals are separately

engaged, non-testifying consultants. *See Herman v. Marine Midland Bank*, 207 F.R.D. 26, 31 (W.D.N.Y. 2002) (“[T]he evidence clearly demonstrates that the expert report submitted by Mr. Gordon was the result of substantial collaborative work by he and Mr. Sommer. Mr. Sommer performed more than half of the total 329.25 hours it took to generate the expert report, and accounted for more than half of the \$61,305.00 fee. Under these circumstances, the fruits of Gordon Associates’ labor is indivisible, and defendant is entitled to explore what Mr. Sommer did.”); *see also Long-Term Capital Holdings v. United States*, No 01-cv-1290(JBA), 2003 WL 21269586, at *4 (D. Conn. May 6, 2003) (holding that a deposition concerning the “participation of [consulting] personnel in the preparation and drafting of the expert reports and the extent of any meetings and contacts between [consultants] and [the testifying expert] does not invoke the work product concerns underlying Rule 26(b)(4)(B)”); *Heitmann v. Concrete Pipe Mach.*, 98 F.R.D. 740, 741 (E.D. Mo. 1983) (holding that there was “substantial need” to order production of consulting expert’s work product where testifying expert considered it in preparing his report; without it, “plaintiff will not be able to effectively cross-examine [the expert]”).

Even if Apple initially attempted to hire the members of Crossfield in separate capacities so it could try to pick and choose what to disclose and what to hide, their close collaboration over the course of many months caused the line between testifying expert and consultant to become hopelessly blurred. If an expert wears these “two hats,” privilege may be asserted “only over those materials generated or considered *uniquely in the expert’s role as consultant.*” *S.E.C. v. Reyes*, No. C 06-4435 CRB, 2007 WL 963422, at *1 (N.D. Cal. Mar. 30, 2007) (emphasis added); *see also B.C.F. Oil Refining, Inc. v. Consol. Edison Co.*, 171 F.R.D. 57, 62 (S.D.N.Y. 1997) (“any ambiguity as to the role played by the expert when reviewing or generating documents should be resolved in favor of the party seeking discovery”). Apple cannot avoid the clear mandate of these cases by its self-serving assertion that Mr. Dragun’s work is unrelated to Dr. Scott’s opinions. Mr. Dragun performed his “consulting” work before or during the time in which he was assisting with Dr. Scott’s “testifying” work. If the Dragun and Hoffman work in early 2012 were truly independent, then Apple would not have produced the Crossfield invoices as incident to the work of Dr. Scott. That they did produce it is telling. Further, Dr. Scott could not confirm that the earlier survey had no influence upon her opinion, and Apple only offers attorney argument that Dragun’s work was performed *uniquely* in a consultant role. Amazon is entitled to test how it influenced Dr. Scott’s opinions because it is apparent that Crossfield’s employees worked “hand-in-glove” with Dr. Scott.

Apple’s position, supported only by attorney argument, merits no weight. *B.C.F.*, 171 F.R.D. at 62 (“Defendant should not have to rely on plaintiff’s representation that these documents were not considered by the expert in forming his opinion.”). *First*, because “[t]he term ‘expert’ includes assistants of the expert witness,” any information Mr. Dragun has must be imputed to Dr. Scott. *Schwarzer et al.*, Federal Procedure Before Trial §11:377.2 (citing Advisory Comm. Notes to 2010 Amendment to Rule 26(b)(4)) (emphasis in original). *Second*, to allow fair cross-examination of experts, courts require discovery into what an expert (and by extension, the expert’s assistant) considered, even when the expert claims under oath that the materials were *not* considered or relied upon—which in any event Dr. Scott was unable to do because she claims no knowledge of the undisclosed work. *See In re Commercial Money Ctr., Inc. Equip. Lease Litig.*, 248 F.R.D. 532, 537 (N.D. Ohio 2008) (“[E]xperts have been deemed to have considered materials even when they have testified, under oath, that they did not consider the materials in forming their opinions.”) (citations omitted); *In re Air Crash Disaster*, 720 F. Supp. 1442, 1444 (D. Colo. 1988) (under Rule 26(b), “an expert ‘relies’ upon material he finds unpersuasive as well as material supporting his ultimate position.”); *Fid. Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005) (“A testifying expert must disclose and therefore retain whatever materials are given him to review in preparing his testimony, even if in the end he does not rely on them in formulating his expert opinion, because such materials often contain effective ammunition for cross-examination.”). Finally, Apple’s repeated reliance on *Westrick* is misplaced. That court (a) echoed the general rule that a close nexus between “testifying” and “consulting” experts justifies disclosure; (b) found that the possibility of influence by the non-testifying expert’s work justified further discovery through

1 both via “substantial need” and the “exceptional circumstances” provision of Rule 26(b)(4)(D)(ii);
 2 and (c) ordered discovery in spite of a sworn declaration of non-reliance by the testifying expert—
 3 not present here. Amazon is entitled to probe the degree of interrelation between Mr. Dragun’s
 undisclosed survey work and Dr. Scott’s ultimate opinions and should not be forced to rely on
 Apple’s representations.

4 *2. The Stipulated Protective Order Does Not Prohibit Discovery Of Mr. Dragun’s Work.*

5 Apple also claims immunity from discovery of Mr. Dragun’s work because under the
 6 stipulated protective order, “[d]iscovery of materials provided to testifying experts shall be limited
 to those materials . . . actually relied upon by the testifying expert.” This provision does not apply
 7 here. *First*, Amazon does not seek discovery of materials “provided to” Crossfield, but instead
 8 materials *generated* by Mr. Dragun and Crossfield. *Second*, the materials are sought for
 9 impeachment purposes, which the protective order does not limit, and for which “exceptional
 10 circumstances” do exist, requiring production. *Third*, Amazon is not seeking discovery of
 11 communications between Crossfield and counsel. Amazon’s request implicates neither Rule 26(b)
 nor the purposes of the protective order.³ *Fourth*, Apple is taking inconsistent positions. On the
 one hand, it insists Dr. Scott has no knowledge of Mr. Dragun’s work. On the other, Apple wants to
 quash discovery under the theory that this work was “provided to” Dr. Scott yet not “relied upon.”
 Apple cannot have it both ways. Apple must produce Mr. Dragun’s survey work and related
 materials and make Messrs. Dragun and Hoffman available for deposition.

12 **Apple’s Statement of Relevant Facts**

13 Amazon requests discovery of consulting expert work that is not responsive to any discovery
 14 request and is protected from disclosure by both the Federal Rules and the Stipulated Protective
 15 Order (“SPO”) entered in this case. Amazon issued no discovery requests regarding experts;
 instead, the parties agreed to produce (i) materials relied on by the experts and (ii) the experts’
 16 invoices. Apple has produced all such materials: Apple’s testifying expert, Dr. Carol Scott designed
 and directed four surveys, and Apple has produced her report on those surveys, all underlying raw
 17 data from those surveys, all material she considered or relied on in forming her opinions, and her
 firm’s invoices. Amazon points to nothing that Dr. Scott has failed to produce. Instead, Amazon
 seeks discovery of work by consulting experts Brian Dragun and Tim Hoffman.

18 Dr. Scott and Messrs. Dragun and Hoffman work at the same consulting firm, Crossfield
 19 Associates LLC (“Crossfield”). Apple disclosed Dr. Scott and Mr. Dragun to Amazon as outside
 experts under the SPO on February 21, 2012, so that those individuals could review materials
 20 designated by Amazon under the SPO. Amazon did not object to that designation. Messrs. Dragun
 and Hoffman performed work for Apple as non-testifying, consulting experts; in addition, they
 assisted Dr. Scott in preparing her four consumer surveys. Apple produced invoices for all of the
 21 work billed by Crossfield—both consulting and testifying—in accordance with the parties’

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 24 ³ The provision cited by Apple logically only applies to communications, drafts, and work product
 shared among *counsel* and an expert. The purpose of this passage is to make clear that the new
 25 expert disclosure rules would govern this action and to promote open and frank communication
 between counsel and expert. If Apple’s expansive reading is correct, then no expert need disclose
 26 material considered but not expressly and affirmatively incorporated into the expert’s report and
 opinions. This would dramatically curtail the parties’ disclosure obligations under Rule 26(a)(2)(B)
 and inhibit cross-examination. It would also nullify the provision of the Protective Order stating
 27 that “[n]othing herein shall alter or change in any way the discovery provisions of the Federal Rules
 28 of Civil Procedure.” Stip. Protective Order ¶22(g), Jan. 3, 2012 [Dkt. 61], at 21.

1 agreement and Federal Rule 26(b)(4)(C)(i), which makes discoverable invoices of an “organization
 2 associated with the expert.”⁴

3 To the extent Messrs. Dragun and/or Hoffman created materials that were considered or
 4 relied on by Dr. Scott, Apple has produced them. To the extent Dragun and/or Hoffman have
 5 generated materials in their consulting expert capacities, such materials are protected from
 6 disclosure by the attorney work product doctrine articulated in Rule 26(b)(3). That work is also
 7 protected by Rule 26(b)(4)(D) which provides: “Ordinarily, a party may not, by interrogatories or
 8 deposition, discover facts known or opinions held by an expert who has been retained or specially
 9 employed by another party in anticipation of litigation or to prepare for trial and who is not
 10 expected to be called as a witness at trial.”

11 Dr. Scott is not familiar with the Dragun/Hoffman consulting work because that work was
 12 neither discussed with nor provided to her and, logically, she cannot consider or rely on work that is
 13 unknown to her. In sworn deposition testimony, Scott explained that Dragun and Hoffman “may
 14 have been doing something for Apple that wasn’t related to me at all,” that she had no knowledge of
 15 what they may or may not have done as consulting experts, that she was unaware of any Crossfield
 16 survey work except for the four surveys she designed and fielded, and “the only [surveys] that I am
 17 relying on are the ones that I personally was involved in, and the ones that I personally was
 18 involved and conducted are the ones that are presented in my report.” (Scott Depo. at 63:13-66:4.)
 19 Accordingly, neither the Federal Rules—which require production of facts and data considered by
 20 the witness in forming her opinions—nor the SPO—which requires production of materials the
 21 expert relied on in forming her opinions—require production of the Dragun/Hoffman consulting
 22 work. Contrary to Amazon’s assertion, Apple has never stated that consulting work product was
 23 “provided” to Dr. Scott but not relied on; nor did that occur. Although Amazon claims that the
 24 Dragun/Hoffman consulting work and the Scott testifying work have become “hopelessly blurred”
 25 and that “Amazon is entitled to probe the degree of interrelation between Mr. Dragun’s undisclosed
 26 survey work and Dr. Scott’s ultimate opinions,” Amazon did not establish those claims at Scott’s
 27 deposition. To the contrary, Amazon asked only one short line of questions about Dragun’s and
 28 Hoffman’s participation in the design of Scott’s four surveys. (*Id.* at 83:17-85:20). By contrast,
 29 Amazon asked Scott dozens if not hundreds of questions about how and why each element of the
 30 surveys was selected, and she never once referred to Dragun or Hoffman. (*See generally id.* at 95-
 31 244). Instead, Scott explained, in detail, her rationale for selecting each survey element. *Id.*

32 Dr. Scott is familiar with, and has testified to, the assistance Messrs. Dragun and Hoffman
 33 provided regarding the surveys that are the subject of her report, and Apple has produced all
 34 materials underlying those surveys. Amazon has not shown and cannot show that Scott is not
 35 competent to testify as to the entirety of the work on her four surveys. Thus, any discovery from
 36 Dragun and Hoffman would target their separate consulting work and directly undermine Rule
 37 26(b)(4)(D)’s protection of work performed by a non-testifying consulting expert witness.

38 Moreover, before the current version of Rule 26(b)(4)(D) became effective, *Amazon*
 39 proposed language to the SPO that set an even higher bar to discovery from non-testifying
 40 consulting experts. During negotiations, Amazon proposed the following:

41 No discovery can be taken from any non-testifying expert except to the extent that
 42 such non-testifying expert has provided information, opinions, or other materials to a
 43 testifying expert relied upon by that testifying expert in forming his or her final
 44 report(s), trial, and/or deposition testimony or any opinion in this case.

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1 Apple agreed to this limitation, and the parties included it in the final SPO entered January 3, 2012.
 2 The parties later confirmed these restrictions, when Apple's counsel wrote, "I presume you don't
 3 intend to alter the limitations on expert discovery in our protective order; accordingly I think the
 4 only expert-related materials the parties would be producing are those materials the experts relied
 5 on and the experts' invoices," and Amazon's counsel replied, "Correct. We were not attempting to
 6 expand the scope of discovery." (D. Asimow to D. Eberhart email of Sep. 12, 2012.)

5 **Apple's Position and Legal Authorities**

6 Amazon argues that consulting expert work performed by Messrs. Dragun and Hoffman is
 7 discoverable because they assisted Dr. Scott with her testimonial survey work, even though it is
 8 uncontested that any such consulting expert work was never disclosed to or discussed with—let
 9 alone relied on by—Dr. Scott. Amazon's position is entirely unsupported by law.

10 Materials not considered or relied on by a testifying expert need not be disclosed. *See, e.g., U.S. ex rel. Westrick v. Second Chance Body Armor, Inc.*, __ F.R.D. __, 2012 WL 6599866 at *7 (D.D.C. 2012). Amazon offers no authority suggesting otherwise. Instead, Amazon cites cases in which documents or information possessed by an assistant or consulting expert *were relied on* by a testifying expert and were, on that basis, required to be produced. For example, in *Derrickson v. Circuit City Stores*, 1999 WL 1456538 at *7, the court ordered discovery from the testifying expert's assistant because he possessed exclusive knowledge about the construction of statistical tables the testifying expert relied on in his report. Specifically, the court required plaintiff to disclose the details of the assistant's analysis and supporting documentation used in preparing the expert's report. Similarly, in *Heitmann v. Concrete Pipe*, 98 F.R.D. at 72, plaintiff sought access to documents prepared by defendant's consulting expert and shared with its testifying expert. The court held that these documents must be produced because the testifying expert admitted to relying on them "as part of my input." *Id.* These cases are inapposite. Apple has already produced all facts and data Scott considered or relied on in forming her opinions, including but not limited to Excel spreadsheets containing the details of her analysis and supporting documentation.

11 It is not in dispute that, absent the effect of the SPO, Rule 26 would require disclosure of
 12 data or information that Dr. Scott considered but did not rely on in forming her opinions. *See In re*
 13 *Commercial Money Ctr., Inc., Equip. Lease Litig.*, 248 F.R.D. at 537 (must disclose materials
 14 testifying expert reviews or generates); *Fid. Nat. Title Ins. Co. of New York v. Intercounty Nat. Title*
 15 *Ins. Co.*, 412 F.3d at 751 (must disclose materials given to testifying expert but not considered); *In*
 16 *re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. at 1444 (must disclose materials
 17 testifying expert reviews but disregards). But the work Amazon seeks was never provided to,
 18 discussed with, or considered by Scott.

19 The Federal Rules explicitly protect from discovery the work of consulting experts like
 20 Messrs. Dragun and Hoffman. *See* F.R.C.P. 26(b)(4)(D). That protection cannot be overcome by
 21 Amazon's speculation that Mr. Dragun's work "influenced and informed" Dr. Scott's surveys and
 22 opinions. *See U.S. ex rel. Westrick*, 2012 WL 6599866 at *4, 7 (refusing to require disclosure of
 23 consulting expert's work based on "nothing more than speculation" that testifying expert relied on
 24 it). In *Westrick*, a consulting expert spent over six years testing bulletproof vests and ultimately
 25 provided some of those vests to the testifying expert. The testifying expert testified that he never
 26 received any information relating to the consulting expert's work. *Id.* at *4. Based on that
 27 testimony, the court determined that "there has not been a waiver of work product protection." *Id.*
 28 The court then considered whether the work product immunity could be overcome. In doing so, the
 court distinguished between (a) "information regarding any pre-testing of [the vests] and the
 ultimate selection of vests [by the consulting expert], [that] by its very nature, encompasses
 opinions, legal theories, and/or litigation strategies" that *should not* be provided, and
 (b) information regarding the consulting expert's storage and care of the vests before they were
 provided to the testifying expert, that was "purely factual information" that *should* be provided

1 based on a showing of substantial need. *Id.* Putting aside the fact that Amazon has failed to
 2 demonstrate “substantial need” for anything, Amazon seeks nothing analogous to the purely factual
 3 storage and care of vests in *Westrick*. Instead, Amazon seeks exactly the type of consulting expert
 4 information that *Westrick* found non-discoverable under any circumstances.
 5

6 Amazon also makes a conclusory claim that “exceptional circumstances” require the
 7 production of Mr. Dragun’s work product in this case.. But Amazon does not identify any
 8 exceptional circumstances, let alone prove they exist. Under Rule 26(b)(4)(D), a party carries a
 9 heavy burden in demonstrating the existence of exceptional circumstances. *Oki Am., Inc. v.*
 10 *Advanced Micro Devices, Inc.*, C 04-3171 CRB JL, 2006 WL 2987022 at *2 (N.D. Cal. Sept. 27,
 11 2006); *see also Westrick*, 2012 WL 6599866 at *7 (no exceptional circumstances where no evidence
 12 that that testifying expert relied on results of consulting expert.). Exceptional circumstances exist
 13 where the condition observed by the expert is no longer observable, where the costs of an
 14 independent examination would be judicially prohibitive, or where there are no other available
 15 experts in the same field or subject area. *Oki*, 2006 WL 2987022 at *2. (internal citations omitted).
 16 Amazon has not met and cannot meet this burden. Amazon has received all materials Dr. Scott
 17 considered in forming her opinions and has a full and fair opportunity to probe Dr. Scott’s
 18 knowledge about that material. “In such circumstances, court after court has refused to permit
 19 discovery from non-testifying experts.” *Id.* at *3.

20 Amazon objects to the fact that Crossfield employs both Dr. Scott and Messrs. Dragun and
 21 Hoffman. But no case holds that a consulting expert’s work must be disclosed if s/he works for the
 22 same firm as the testifying expert. To the contrary, a party may retain the *same individual* to both
 23 testify and consult without opening the consulting work to discovery. *See, e.g., Sara Lee Corp. v.*
Kraft Foods Inc., 273 F.R.D. 416, 419-20 (N.D. Ill. 2011) (“a single expert may serve” as both “a
 24 non-testifying consultant and a testifying expert,” and is not required to disclose materials generated
 25 in the consulting role). As Amazon notes, some cases indicate that ambiguity in such a dual
 26 (testifying and consulting) role should be resolved in favor of disclosure. But none of the experts in
 27 question play such a dual role: Dragun and Hoffman are not testifying and Scott did not consult.
 28 Moreover, Amazon has not shown any such ambiguity. In both cases Amazon cites—*S.E.C. v.*
Reyes and B.C.F. Oil Ref., Inc. v. Consol. Edison Co. of New York, Inc.—the same expert or experts
 had been hired in a dual testifying and consulting role. Consequently, any claim by the “dual
 expert” that he had not “considered” certain documents was hollow, particularly where the expert
 had personally generated those documents. But Scott did not generate any material Amazon seeks.

29 Mr. Dragun’s and Mr. Hoffman’s roles, moreover, are unlike those of the assistants and
 30 consulting experts in Amazon’s cases. In *Herman v. Marine Midland Bank*, e.g., plaintiff’s
 31 “consulting” expert’s deposition was required because he was a listed co-author of the testifying
 32 expert’s report, and plaintiff “ascribe[d] dispositive reliance” to the consultant’s work on the report.
 33 207 F.R.D at 31. Similarly, in *Long-Term Capital Holdings, LP v. United States*, the “consulting”
 34 experts allegedly prepared all quantitative analyses included in the expert reports, drafted portions
 35 of the reports, and provided many of the conclusions in the reports. Even on such facts, the court
 36 permitted only a limited deposition to determine the extent of the consulting experts’ work in
 37 preparing and drafting the reports and prohibited questions on the consultants’ underlying
 38 substantive analysis. 2003 WL 21269586 at *4. Testifying experts may, of course, use assistants,
 39 and such assistants ordinarily need not testify. *See, e.g., Dura Auto. Sys. of Indiana, Inc. v. CTS*
Corp., 285 F.3d 609, 612-13 (7th Cir. 2002) (assistants normally need not testify; if an assistant is
 40 deposed, deposition limited to establishing competent performance of tasks). Amazon’s claim that
 41 “any information Mr. Dragun has must be imputed to Dr. Scott” is both wrong and is spun from
 42 language that stands for the opposite proposition: an assistant’s work is *protected* as work product
 43 just like the testifying expert’s work. Advisory Comm. Notes to 2010 Amendment to Rule 26(b)(4).
 44 In any event, it is not Mr. Dragun’s work in the role of an assistant that Amazon seeks.

45 Amazon urges that the SPO cannot affect the outcome of this motion. Because Amazon has
 46 not met the lower standard for discovery provided by the FRCP, it is correct that the Court need not
 47

1 analyze the effect of the SPO. But Amazon cannot meet the heightened standard required by the
2 SPO because the consulting expert work was not relied on (nor provided to) Dr. Scott; accordingly,
the SPO is an independent reason to deny Amazon's motion.⁵

3 Amazon provides no basis for discovery of work performed by Apple's non-testifying,
4 consulting experts that was never disclosed to Dr. Scott. Amazon's motion should be denied.

5
6 DATED: March 15, 2013.

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DAVID J. SEPANIK
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7
8 By: _____ /s/ David R. Eberhart
9 DAVID R. EBERHART

10 Attorneys for Plaintiff and Counter-Defendant
11 APPLE INC.

12 DATED: March 15, 2013.

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13
14 By: _____ /s/ Martin R. Glick
15 MARTIN R. GLICK

16 Attorneys for Defendants and Counter-Claimants
17 AMAZON.COM, INC. and AMAZON DIGITAL
18 SERVICES, INC.

19 **FILER ATTESTATION**

20 I, Martin R. Glick, am the ECF user whose identification and password are being used to file
21 this **JOINT DISCOVERY LETTER BRIEF CONCERNING EXPERT DISCOVERY**
MATTER. In compliance with Local Rule 5-1(i)(3), I hereby attest that David R. Eberhart concurs
22 in this filing.

23 _____ /s/ Martin R. Glick
24 MARTIN R. GLICK

25
26
27 _____
28 ⁵ Amazon claims that paragraph 22(g) of the SPO precludes this result, but that argument would
make the SPO language regarding experts void *ab initio*.